

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Redesignation of the 17.7-19.7 GHz)
Frequency Band, Blanket Licensing of)
Satellite Earth Stations in the 17.7-20.2 GHz)
and 27.5-30.0 GHz Frequency Bands, and the)
Allocation of Additional Spectrum in the)
17.3-17.8 GHz and 24.75-25.25 GHz)
Frequency Bands for Broadcast Satellite-)
Service Use)

IB Docket No. 98-172
RM-9005
RM-9118

OPPOSITION OF HUGHES ELECTRONICS CORPORATION

Hughes Electronics Corporation ("*Hughes*") hereby opposes the Petition for Clarification and Reconsideration of Winstar Communications, Inc. in the above-captioned proceeding.¹

I. THE COMMISSION SHOULD REJECT WINSTAR'S INDETERMINATE REQUEST TO "MAKE WHOLE" THE TERRESTRIAL FIXED SERVICE

Winstar's primary complaint in arguing for reconsideration of the 18 GHz Order² appears to be that the Order "ignores the explosive growth within [the terrestrial fixed] service and fails to provide adequate alternative spectrum" for use by FS licensees upon relocation from

¹ Petition for Clarification and Reconsideration of Winstar Communications, Inc. in IB Docket 98-172 (filed October 10, 2000) ("*Winstar Petition*").

² *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, FCC 00-212 (rel. June 22, 2000) (the "18 GHz Order").

the 18.58-19.3 GHz band.³ Winstar also argues, in support of this complaint, that the 2 GHz Microwave Relocation rules do not provide an appropriate analogy for the 18 GHz relocation rules⁴ and that “alternative media,” such as fiber networks, will not provide an adequate replacement for 18 GHz radiofrequency spectrum.⁵

Yet, aside from a request to revise the definition of “throughput” for purposes of determining whether the FS licensee has been relocated to “comparable” facilities,⁶ which, as discussed below, should be rejected, Winstar’s Petition does not ask the Commission to take any specific action on reconsideration to remedy Winstar’s central complaint. Thus, despite spending the majority of its pleading lamenting this “failure” of the Commission in the 18 GHz Order, Winstar fails in its Petition to “state with particularity the respects in which”⁷ the 18 GHz Order should be changed to remedy this complaint. Therefore, as a threshold matter, the Commission must disregard or dismiss Winstar’s arguments in this respect.

Moreover, Winstar’s complaint that the 18 GHz Order failed to account for the anticipated growth of Winstar’s service is incorrect and based upon a false premise. As the Commission acknowledged in the 18 GHz Order, segmentation of the 18 GHz Band into separate terrestrial fixed and satellite uses benefits *both industries*.⁸ Each service will be able to make greater use of, and accomplish denser deployment in, its newly segmented band. For example, prior to the segmentation accomplished by the 18 GHz Order, the Commission’s rules

³ Winstar Petition at 9.

⁴ Winstar Petition at 11.

⁵ Winstar Petition at 12-13.

⁶ *See* Winstar Petition at 9.

⁷ 47 C.F.R. § 1.429(c) (1999).

⁸ 18 GHz Order at ¶ 17.

for the 600 MHz between 17.7 - 18.3 GHz required that terrestrial fixed operators account for and coordinate with prior licensed earth stations as these terrestrial operators seek new licenses to grow their systems. This co-primary sharing regime necessarily limits growth opportunities for both terrestrial and satellite systems in the shared band. The Commission's designation in the 18 GHz Order of the 17.7 - 18.3 GHz band for exclusive use by the terrestrial fixed service, of course, removes those growth limits in, and allows for greater use of, that band by the terrestrial fixed service. Winstar completely fails to acknowledge this benefit provided by the 18 GHz Order segmentation plan.

Indeed, Winstar's comparison to the 2 GHz Microwave Relocation rules further underscores Winstar's myopic view of the 18 GHz band segmentation. Winstar argues that the 2 GHz rules do not provide a valid analogy for the 18 GHz rules because the 2 GHz licensees' needs were fairly static, while Winstar's needs at 18 GHz are expanding explosively.⁹ Even accepting this dubious premise, a comparison with the relocated services at 2 GHz and the terrestrial fixed service at 18 GHz actually argues for a less generous segmentation and relocation regime for 18 GHz licensees than the regime installed at 2 GHz, not a more generous result as Winstar suggests.

At 2 GHz, the incumbent microwave licensees were relocated for a new entrant service as a part of a spectrum "refarming" process. The 2 GHz spectrum was not shared on a co-primary basis between the incumbent and new entrant services, and prior to the commencement of the Emerging Technologies proceeding, the 2 GHz incumbent licensees had no notice that they might have to share their spectrum with another co-primary service. In contrast, at 18 GHz, there is no "new entrant," but instead two co-primary "incumbent" services

⁹ Winstar Petition at 11.

exist today. The 17.7 - 19.7 GHz band has been a shared satellite/terrestrial band for more than twenty-five (25) years, since 1973, when the Commission opened up this band as a much-needed expansion band for broadband satellite systems.¹⁰

Moreover, if existing terrestrial fixed service licensees at 18 GHz failed to take into account in their business plans the limits on growth opportunities that are necessarily a part of the *co-primary* FS allocation at 18 GHz, it is their own fault and not the fault of the Commission or satellite licensees. The Commission's rules have been clear since 1973 that the 18 GHz band was a co-primary, shared band and Hughes and other satellite licensees have made clear since at least 1993 that they intended to utilize that band for small, ubiquitously deployed earth stations. It is clear from the tenor of Winstar's Petition that Winstar did not plan to share the 18 GHz band with co-primary satellite licensees,¹¹ but Winstar's failure to adequately assess the co-primary nature of the 18 GHz band does not provide a basis for the Commission to revisit its segmentation or relocation decisions in the 18 GHz Order.

Likewise, Winstar's specific argument that the Commission should measure the "throughput" of an FS system that is to be relocated by reference to the total capacity of the licensed facility, rather than the actual capacity in use,¹² similarly ignores the benefits to the fixed service of the 18 GHz segmentation decision. The 18 GHz Order installs a more than generous relocation regime for FS licensees that currently occupy the 18.58 - 19.3 GHz band. As Hughes argued previously in this proceeding, the benefits of the 18 GHz segmentation decision to the fixed service and the comparable "equities" that each of the fixed terrestrial and

¹⁰ See *In Re Establishment of Domestic Communication-Satellite Facilities by Non-Governmental Entities*, 25 FCC 2d 718, (¶¶ 1-5) (1970); *In Re Amendment of Part 2 of the Commission's Rules to Conform with Space WARC 1971*, 39 FCC 2d 959 (1973).

¹¹ See Winstar Petition at 10.

satellite services holds in the 18 GHz band argue for each service to bear its own costs of relocating to the newly segmented bands.¹³ Thus, the Commission's decision to limit the "throughput" of the relocated FS system to the capacity actually in use is more than balanced and fair. The decision ensures that grandfathered FS licensees do not warehouse spectrum during the transition period in the hope of receiving a windfall of capacity upon relocation by a satellite licensee and recognizes that FS licensees will have additional growth opportunities in the 17.7 - 18.3 GHz band.

Furthermore, the Commission's decision to permit relocation to "alternative media" is also the correct one. Alternative media, such as fiber, wireline or even satellite communications networks, will likely provide necessary flexibility in the relocation process. Allowing this flexibility only makes sense. Indeed, for the Commission to foreclose the option to relocate existing licensees to comparable facilities in alternative media (as Winstar suggests) would put the Commission in the untenable position of selecting between competing but comparable technologies. Moreover, so long as the alternative media facilities are "comparable" under the Commission's 18 GHz relocation rules, relocated licensees should not have a basis for concern. These alternative media will need to meet the Commission's tests for throughput, reliability and operating cost, just the same as a terrestrial fixed wireless relocation option.

Thus, Winstar's arguments -- both vague and specific -- that the Commission failed to properly consider and accommodate the growth needs of the terrestrial fixed wireless service at 18 GHz are unavailing. Winstar's central complaint fails to acknowledge the formerly co-primary nature of the 18 GHz band and the benefits of segmentation to the fixed service.

¹² Winstar Petition at 9.

Winstar also fails to request a specific remedy for this central complaint. Furthermore, Winstar's specific requests are unwise and unworkable and would result in an inappropriate windfall for relocated FS licensees. Thus, the Commission should disregard and dismiss Winstar's arguments in this regard.

II. WINSTAR'S REQUESTED MODIFICATIONS TO THE 18 GHZ RELOCATION RULES ARE DESIGNED TO EXTRACT PREMIUMS FROM SATELLITE LICENSEES

Winstar requests two changes to the 18 GHz relocation rules adopted by the 18 GHz Order. First, Winstar argues that the Commission should establish a right for relocated FS licensees to return to their previous facilities at any time during a twelve-month trial period after relocation.¹⁴ Second, Winstar argues that the Commission should provide for a voluntary negotiation period in addition to the two-year mandatory negotiation period established in the 18 GHz Order.¹⁵ The Commission's decision to reject these two provisions in the 18 GHz Order was the correct one. Reversing that decision would result in a less efficient and less fair relocation process by allowing the FS licensees to exact relocation premiums from satellite licensees. Moreover, the Commission's experience from the 2 GHz PCS relocation process counsels strongly against granting Winstar's requests.

Winstar argues that a twelve-month trial period and a "right of return" is necessary to ensure that replacement systems are in fact comparable under "real world" operating conditions.¹⁶ However, the Commission's 18 GHz relocation rules clearly provide that involuntary relocation will occur only if a satellite licensee has built *and tested* a comparable

¹³ Reply Comments of Hughes Electronics Corporation at 12, IB Docket 98-172 (filed December 21, 1998).

¹⁴ Winstar Petition at 17.

¹⁵ Winstar Petition at 18-19.

facility for the relocated FS licensee *prior* to relocation of that licensee.¹⁷ The FS licensee has the ability to contest the comparability question before the Commission if the satellite licensee has not conducted appropriate testing and the Commission has reserved the right to order the satellite licensee to take additional measures to ensure comparability after the FS licensee has relocated.¹⁸ Thus, Winstar's stated concern about real world operations is specious. In fact, as Winstar clearly admits,¹⁹ *the real reason that Winstar wants a trial period and a right of return is to increase its bargaining leverage with satellite licensees in the relocation process.* As the Commission clearly experienced in the 2 GHz PCS relocation process, existing licensees with unfair bargaining leverage and the right to delay the process often demand premiums to abide by what is otherwise required of them under the rules.²⁰

Moreover, as the Commission rightly indicated in the 18 GHz Order²¹ a trial period and a right of return would unduly complicate and delay the already burdensome relocation process for satellite licensees. Satellites provide ubiquitous coverage and the services that satellite systems will provide in their satellite-exclusive Ka band spectrum require ubiquitously available spectrum before the services can be mass marketed to the public. After having completed the arduous process of clearing this newly segmented satellite spectrum, and having begun to market ubiquitous satellite services to the public, satellite licensees simply cannot be subject to a requirement that would reintroduce interference from terrestrial wireless

¹⁶ Winstar Petition at 17.

¹⁷ 47 C.F.R. 101.91(a)(3).

¹⁸ 18 GHz Order at ¶ 82.

¹⁹ Winstar Petition at 17.

²⁰ *See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 12 FCC Rcd 2705, ¶ 11 (1997); *Major PCS Carriers Seek Relief on Microwave Relocation*, Communications Daily, March 28, 1996.

systems into the cleared band. Even if such a provision was workable in the 2 GHz PCS relocation, Winstar's analogy to the 2 GHz microwave relocation rules in this respect is inapposite because the service relocating the existing licensees in that case, PCS, was itself rolled out on a phased basis. Thus, the Commission should reject Winstar's request for a trial period and right of return. Such a provision is unnecessary, unworkable and aimed at an inequitable result.

Likewise, Winstar's request for a voluntary negotiation period in addition to the two-year mandatory negotiation period²² is unnecessary and aimed at unfairly increasing Winstar's bargaining leverage with satellite licensees. Winstar's request is clearly an attempt to delay the 18 GHz relocation process. Adding an additional time period in addition to the two-year mandatory negotiation period simply increases the amount of time that terrestrial fixed service operators have to operate until they are subject to involuntary relocation. Moreover, contrary to Winstar's assertion that a voluntary negotiation period produces efficient and fair relocation,²³ the Commission's experience with the 2 GHz PCS relocation clearly demonstrates that a voluntary negotiation period allows existing licensees to refuse to negotiate unless the party seeking relocation offers a premium.²⁴ The two-year mandatory negotiation period established by the 18 GHz Order provides more than sufficient notice to existing FS licensees of the requirement to relocate, especially as 18 GHz fixed service licensees should have been aware

²¹ 18 GHz Order at ¶ 19.

²² Winstar Petition at 18-19.

²³ Winstar Petition at 19.

²⁴ *See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 12 FCC Rcd 2705, ¶ 11 (1997); *Amendment To The Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825, ¶¶ 11, 43 (1996).

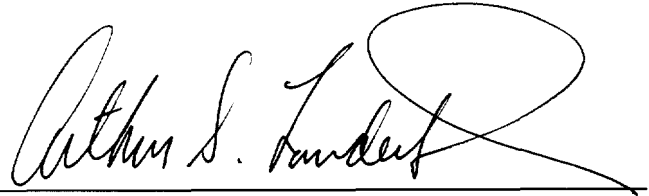
of the potential need to relocate their facilities at least since the release of the NPRM in this proceeding.²⁵ The two-year mandatory negotiation period also provides ample time, given good faith negotiations by both parties, to evaluate the FS facility to be relocated and come to an agreement on comparable facilities for relocation. The Commission should deny Winstar's request to lengthen and complicate the relocation process.

III. CONCLUSION

For all of the foregoing reasons, Hughes Electronics Corporation respectfully requests that the Commission deny or dismiss the Winstar Petition as discussed herein.

Respectfully submitted,

HUGHES ELECTRONICS CORPORATION

A handwritten signature in black ink, reading "Arthur S. Landerholm", is written over a horizontal line.

Gary M. Epstein
John P. Janka
Arthur S. Landerholm
LATHAM & WATKINS
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, DC 20004
(202) 637-2200

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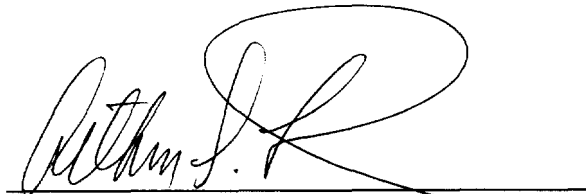
²⁵ Cf. Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, FCC 00-233, at ¶ 44 (noting that a shorter relocation period was appropriate because the service subject to relocation had been aware of proceeding for several years).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition of Hughes Electronics Corporation was sent by messenger, this 13th day of November, 2000, to the following:

Jack Richards
Keller and Heckman, LLP
1001 G Street, N.W.
Washington, DC 20001

Joseph M. Sandri, Jr.
Barry J. Ohlson
Winstar Communications, Inc.
1615 L Street, N.W.
Suite 1260
Washington, DC 20036



Arthur S. Landerholm